LIBRARY
SUPREME COURT, U. S.

411

No.

Supreme Court, U.S.
FILED
JUL 17 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

DANA EILEEN TUCK,
Petitioner,

vs.

STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

Counsel of Record for Petitioner:

CHARLES O. PORTER
858 Pearl Street
Eugene, Oregon 97401

Other Counsel for Petitioner:

JOSEPH P. MORRAY
COLLEY and MORRAY
651 N.W. Jackson Ave.
Corvallis, Oregon 97330

SUBJECT INDEX

Page

Opinions of the Courts Below 1

Statement of the Grounds on Which the Jurisdiction of This Court is Invoked 1

Questions Presented for Review 2

Constitutional Provisions Which the Case Involves 4

Statement of the Case 5

Stage of the Proceedings in the Court of First Instance and in the Appellate Court at Which and the Manner in Which the Federal Questions Sought to be Reviewed Were Raised 6

Argument Amplifying Reasons Relied on for Allowance of the Writ 8

Appendix I: Opinion of Oregon Court of Appeals 13

Appendix II: Judgment of Oregon Court of Appeals 19

Appendix III: Denial of Rehearing by Oregon Court of Appeals 21

Appendix IV: Denial of Petition for Review by Oregon Supreme Court 23

TABLE OF CASES CITED

Page

Chimel v. California, 395 US 752, 89 S Ct 2034, 23 LEd 2d 685 (June 23, 1969) 2, 6, 7, 8, 9, 10

Fresneda v. State, ... Alaska ...., 458 P2d 134 (1969) 10

Giordenello v. United States, 357 US 480, 78 S Ct 1245, 2 LEd 2d 1503 (1958) 3

Lyon v. United States, 416 F 2d 91 (CA5, 1969) 10

Shipley v. California, 395 US 818, 89 S Ct 2053, 23 LEd 2d 732 (1969) 10

Van Cleef v. New Jersey, 395 US 814, 89 S Ct 2051, 23 LEd 2d 728 (1969) 10

Weems v. United States, 217 US 349, 30 S Ct 544, 54 LEd 793 (1910) 3, 5, 6

IN THE SUPREME COURT OF THE UNITED STATES

DANA EILEEN TUCK,
Petitioner,
vs.
STATE OF OREGON.

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF OREGON

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of Dana Eileen Tuck for a writ of certiorari to review a judgment of the Court of Appeals of Oregon respectfully shows to this Honorable Court:

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the trial court.

A copy of the opinion of the Court of Appeals of the state of Oregon affirming petitioner's conviction is annexed to this petition as Appendix I. The opinion is reported at 89 Or Adv Sh 815, 462 P2d 175 (1969).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked on the following grounds:

(1) Petitioner-defendant's petition for review was denied by the Oregon Supreme Court on April 21, 1970 and on that date the judgment of the Oregon Court of Appeals rendered on December 12, 1969, became final.

(2) The opinion of the Oregon Court of Appeals af-

firming the judgment of the Circuit Court, Benton County, was rendered on December 12, 1969. A petition for rehearing was timely filed with the Oregon Court of Appeals on January 15, 1970. This petition was denied on February 3, 1970. Petitioner-defendant filed a timely petition for review with the Supreme Court of the state of Oregon on March 3, 1970. Said petition for review was denied by the Oregon Supreme Court on April 21, 1970. Appendices I-IV.

(3) Jurisdiction is conferred on this Court to review the judgment in question by Writ of Certiorari by Title 28, Section 1257 (3) of the United States Code.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are the following:

(1) Whether the limitation on a search incident to a lawful arrest announced in *Chimel v. California*, 395 US 752, 89 S Ct 2034, 23 LEd 2d 685 (June 23, 1969), is applicable to a state criminal case pending on direct appeal at the time the *Chimel* case was decided.

(2) Whether under the *Chimel* decision the state has the burden of proving the seizure of evidence to have been justified in the absence of a search warrant or consent.

(3) Whether the seizure of a jewel box containing contraband hidden under a false bottom is justified where the jewel box was visible but the contents were not discoverable until the box had been opened and the false bottom removed, the jewel box being beyond the reach of the defendant at the time of its seizure.

(4) Whether a general search of defendant's house, including an adjoining lavatory, by three police officers incident to a lawful arrest but without a search warrant or consent invalidates a seizure of evidence assumed to be within the reach of the defendant at the time of the seizure.

(5) Whether the state must show that there existed some risk that the defendant would destroy the evidence seized, where the seizure took place incident to a lawful arrest without a search warrant or consent.

(6) Whether defendant-petitioner's rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and *Giordenello v. United States*, 357 US 480, 78 S Ct 1245, 2 LEd 2d 1503 (1958) were violated by the arrest of defendant-petitioner upon an arrest warrant issued by the District Court of the state of Oregon without an independent inquiry into the factual basis for the affidavit and without an independent judgment as to the existence of probable cause for the arrest.

(7) Whether defendant-petitioner's rights under the Eighth and Fourteenth Amendments of the United States Constitution and *Weems v. United States*, 217 US 349, 30 S Ct 544, 54 LEd 793 (1910) have been violated by the suspension of imposition of sentence and probation for five years, one of the conditions of probation being that defendant serve one year in the county jail.

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

The constitutional provisions involved in this case are the following:

(1) The Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(2) The Fifth Amendment to the United States Constitution, which provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

(3) The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

(4) The Fourteenth Amendment to the United States Constitution, which provides:

> * * * no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A warrant for the arrest of defendant was sought from the District Court of Benton County on the affidavit of a police officer who had not seen the defendant committing a crime. The District Court issued the arrest warrant, relying solely on the affidavit without an independent inquiry into the factual basis for the affidavit and without an independent judgment as to the existence of probable cause for the arrest. Armed with this arrest warrant, but no search warrant, three police officers went to the small house where defendant was living. One of them arrested her, and all three began a search of the house. One officer removed a closed jewel box from the top of a television set. Defendant protested. The officer overruled her protest and said "I want to take a look at it". He then opened the jewel box, examined it, and discovered that it had a false bottom. He then lifted the false bottom and found under it hand rolled cigarettes and a folded paper containing powder. The jewel box and its contents were seized as evidence and introduced by the state against defendant at her trial. No evidence was offered as to whether the items seized by the police were within the reach of the defendant. No evidence was offered as to whether any risk existed that the defendant would destroy the evidence seized. Defendant was convicted on October 8, 1968, in the Circuit Court of the state of Oregon for the county of Benton of unlawful possession of narcotics (marihuana) and of ille-

gal possession of a dangerous drug (methamphetamine). The Circuit Court sentenced defendant on count I by suspending imposition of sentence and placing the defendant on probation for five years subject to various conditions including that she serve one year in the Benton County jail. On count II the defendant was sentenced to serve six months in the Benton County jail. While appeal to the Court of Appeals of the state of Oregon was pending, the United States Supreme Court announced the decision in *Chimel v. California*, 395 US 752, 89 S Ct 2034, 23 LEd 2d 685 (June 23, 1969). Thereafter, on December 12, 1969, the Court of Appeals of the state of Oregon affirmed the judgment, and defendant's petition for review, timely filed with the Oregon Supreme Court, was denied by that Court on April 21, 1970, without opinion.

STAGE OF THE PROCEEDINGS IN THE COURT OF FIRST INSTANCE AND IN THE APPELLATE COURT AT WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

Manner in which the federal questions were raised:

(1) The *Chimel* case was announced by the Supreme Court after petitioner-defendant had filed her brief on appeal to the Court of Appeals of the state of Oregon. In her reply brief petitioner-defendant presented her objections to the admission of the jewel box and its contents as evi-

dence against her, relying on *Chimel v. California.* The Oregon Court of Appeals ruled that it was proper to admit the evidence, since the jewel box was visible and was within the reach of the defendant. The Oregon Court of Appeals said:

> It is not necessary for us to decide in this case whether *Chimel* should be applied to cases arising prior to June 23, 1969. The house in which the defendant was arrested was small, having formerly been a one-car garage. The jewel box containing marihuana and methamphetamine was not concealed, but was plainly visible on top of a television set within reach of the defendant and the arresting officer. In *Chimel*, 23 LEd 2d at 694, the court said:
>
> > * * * There is ample justification therefore, for a search of the arrestee's person and the area 'within his immediate control' —construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> Here, the search and seizure were proper. 89 Or Adv Sh 815, 818.

(2) Petitioner-defendant challenged the validity of the arrest warrant for the first time in her petition for rehearing to the Oregon Court of Appeals. The Oregon Court of Appeals denied the petition for rehearing without opinion. The petitioner-defendant again presented the question in her petition for review to the Oregon Supreme Court. The Oregon Supreme Court denied her petition without opinion.

(3) Petitioner-defendant first presented her challenge to the sentence imposed, relying on *Weems v. United States,*

217 US 349, 30 S Ct 544, 54 LEd 793 (1910), in her appellant's brief to the Court of Appeals of the State of Oregon. The Oregon Court of Appeals in sustaining the Circuit Court's sentence did not mention the *Weems* case. The Court said:

> The defendant claims the punishment is out of proportion to the offense committed and that the judgment of the court is in violation of the Oregon Constitution, Article I, Sections 15 and 16. The order and sentence were within the statutory authority of the court, and we will not substitute our judgment for that of the trial court. *Sobota v. Williard*, 247 Or 151, 153, 427 P2d 758 (1967), *State v. Teague*, 215 Or 609, 336 P2d 338 (1959).
>
> The trial court is authorized by ORS 137.540 to impose conditions in granting probation. The conditions imposed here appear to us to be reasonable and in the defendant's own interests. The sentence is not such "as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances." *State v. Teague, supra.* 89 Or Adv Sh 815, 817.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

Assuming that the arrest of defendant was lawful, the search of the house and seizure of the jewel box and its contents nevertheless violated defendant's rights under the Fourth and Fourteenth Amendments of the United States Constitution. The United States Supreme Court held in *Chimel v. California*, 395 US 752, 89 S Ct 2034, 23 LEd 2d 685 (1969) that a search may not take place without a search warrant except insofar as a search is necessary to

prevent one who has been lawfully arrested from seizing a weapon and from destroying evidence. The jewel box was not a weapon. Nor does it appear that it was destructible in the circumstances of this arrest. The same conclusion applies to the materials inside the box. The state has not shown that it would have been possible for the defendant to remove the materials from the box and destroy them. Had she tried to go into the lavatory with them an officer could have restrained her. There is no basis for holding that this seizure took place in order to prevent the defendant from destroying the evidence before she could be removed from the house by the police. Therefore the seizure does not come within the exception defined as lawful by *Chimel.*

The Court in the *Chimel* case defined the area within which a search can lawfully be made incident to a lawful arrest and without a search warrant as that area within the reach of the person arrested. 23 LEd 2d at p. 696. *In the case at bar the record does not indicate how great a distance there was between the defendant and the jewel box, nor whether other persons or objects stood between her and the jewel box.* Therefore the state has not met its burden of showing that the jewel box was within her reach at the time she was arrested.

Since the testimony of the police officers who testified indicates that three police officers searched the entire house, including a lavatory adjoining the room where de-

fendant was arrested, the record compels the inference that they engaged in a general search, even though they called it a search of "the immediate area". (Transcript of Trial and Hearing, pp. 3-7, 18). Therefore the state has not met its burden of showing that the search was confined to the area within the immediate control of the person arrested. This area is defined in the *Chimel* case as the area within the reach of the person arrested. 23 LEd 2d at p. 696. Therefore, even if the jewel box was within defendant's reach, the search and seizure were nevertheless a violation of her constitutional rights because the search included areas clearly beyond her reach and hence beyond her immediate control.

A Writ of Certiorari should be granted since the Oregon Court has decided a federal question of substance in a way probably not in accord with applicable decisions of the United States Supreme Court.

Decisions conflict as to whether *Chimel* should apply to cases pending on direct appeal at the time *Chimel* was decided. *Lyon v. United States*, 416 F 2d 91 (CA 5, 1969), holding *Chimel* does not apply; *Fresneda v. State*, ... Alaska ....., 458 P2d 134 (1969), holding *Chimel* does apply. This Court has expressly refrained from ruling on the question up to this time. *Van Cleef v. New Jersey*, 395 U.S. 814, 89 S Ct 2051, 23 LEd 2d 728 (1969); *Shipley v.*

California, 395 US 818, 89 S Ct 2053, 23 LEd 2d 732 (1969).

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals of the state of Oregon to the end that the judgment of the Court of Appeals of Oregon may be reviewed and reversed by this Honorable Court.

Dana Eileen Tuck, Petitioner

By Charles O. Porter
Joseph P. Morray
Counsel for Petitioner

APPENDIX I

No. 63—December 12, 1969

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In Banc

STATE OF OREGON, *Respondent*, *v.*
DANA EILEEN TUCK,
Appellant.

Appeal from Circuit Court, Benton County.

Charles H. Foster, Judge.

Argued and submitted October 31, 1969.

Robert M. Gordon, Corvallis, argued the cause and filed the briefs for appellant.

Frank D. Knight, District Attorney, Corvallis, argued the cause and filed the brief for respondent.

AFFIRMED.

BRANCHFIELD, J.

This is an appeal from conviction on the dual charges of illegal possession of narcotics and illegal possession of a dangerous drug.

The defendant and three other young women were living in a small house in Corvallis, Oregon. The police had a warrant for the arrest of the defendant and had gone to the house to place her under arrest. The officers knocked on the door and were admitted by the defendant. She was immediately placed under arrest and one officer picked up a small jewel box from a television set just inside the door. The defendant grabbed for the box and said, "Give it to

me, it's mine." In the false bottom of the jewel box the policeman found four marihuana cigarettes and a powder fold containing methamphetamine.

As her first assignment of error, the defendant asserts that the court erred in denying her motion for a directed verdict of acquittal at the completion of the state's case. She argues there is no evidence that the defendant knew there was marihuana or methamphetamine in the house at the time of her arrest but even if she did know that such drugs were there, that there was no evidence that she had or exercised control over them.

In *State v. Williams*, 117 Or 238, 243, 243 P 563 (1926), the court said:

> "If there were any fact or circumstance from which the jury could have drawn a reasonable inference that defendant was exercising some control, dominion or ownership over the intoxicating liquor, it would have been a question of fact for the determination of the jury; * * * ."

The defendant's assertion of ownership of the jewel box and her attempt to retake it from the officer were sufficient circumstantial evidence of her knowledge and control to warrant denial of her motion for acquittal. We cannot grant a new trial for insufficiency of the evidence unless we can affirmatively say there was no substantial evidence to support the verdict. *State v. Gardner*, 225 Or 376, 379, 358 P2d 557 (1961). The trial court correctly permitted this case to go to the jury for its determination.

On the charge of possession of marihuana, the court

suspended imposition of sentence and placed the defendant on probation for five years subject to certain conditions, including the requirement that she serve one year in Benton County jail and that her probation officer be permitted to visit her at her place of abode at any time of the day or night. On the charge of possession of methamphetamine, the defendant was sentenced to serve six months in the Benton County jail, concurrent with the other sentence. The defendant claims the punishment is out of proportion to the offense committed and that the judgment of the court is in violation of the Oregon Constitution, Article I, Sections 15 and 16. The order and sentence were within the statutory authority of the court, and we will not substitute our judgment for that of the trial court. *Sobota v. Williard*, 247 Or 151, 153, 427 P2d 758 (1967), *State v. Teague*, 215 Or 609, 336 P2d 338 (1959).

The trial court is authorized by ORS 137.540 to impose conditions in granting probation. The conditions imposed here appear to us to be reasonable and in the defendant's own interests. The sentence is not such "as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances." *State v. Teague*, supra.

In her reply brief, for the first time, the defendant argues that the objects seized in this case should be excluded from consideration as evidence. This belated claim is based upon *Chimel v. California*, 395 US 752, 89 S Ct 2034, 23 L Ed2d 685 (1969), which held invalid a search incident to

arrest. She argues that *Chimel* enunciates a newly pronounced principle of constitutional law and that it should be operative with respect to all cases being tried or upon direct appeal at the time that decision was handed down.

The state counters by saying that *Chimel* should not have retrospective application. See *Desist v. United States*, 394 US 244, 89 S Ct 1030, 22 L Ed 2d 248 (1969), for the tests to be used in determining whether to grant retrospective application.

Chimel has been held not to be retroactive in several recent cases: *Jordan v. United States*, 416 F2d 338 (9th Cir, 1969); *Lyon v. United States*, 416 F2d 91 (5th Cir, 1969); *United States v. Bennett*, 415 F2d 113 (2d Cir, 1969); *Prater v. Mancusi*, ___ F Supp ___, 5 Crim L Rptr 2365 (SDNY 1969); *People v. Castillo*, ___ Cal App 2d ___, 80 Cal Rptr 211, 5 Crim L Rptr 2365 (1969); *Scott v. State*, — Md App —, 256 A2d 384, 5 Crim L Rptr 2426 (1969). Contra, in *Fresneda v. State*, ___ Alaska ___, 458 P2d 134 (1969), the court announced that it would apply *Chimel* to all cases pending before that court on the date *Chimel* was decided.

It is not necesary for us to decide in this case whether *Chimel* should be applied to cases arising prior to June 23, 1969. The house in which the defendant was arrested was small, having formerly been a one-car garage. The jewel box containing marihuana and methamphetamine was not concealed, but was plainly visible on top of a television set

within reach of the defendant and the arresting officer. In *Chimel*, 23 L Ed2d at 694, the court said:

> "* * * There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

Here, the search and seizure were proper.

The judgment is affirmed.

APPENDIX II

BE IT REMEMBERED that in the COURT OF APPEALS of the State of Oregon, in the city of Salem, on this FRIDAY, the 12th day of DECEMBER, 1969, the following proceedings were had:

STATE OF OREGON,
Respondent

v.

DANA EILEEN TUCK,
Appellant

Appeal from
BENTON County
No. 23278

This cause on October 31, 1969, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and ADJUDGED that the judgment of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

IT FURTHER IS ORDERED that respondent have and recover of and from appellant its costs and disbursements in this court taxed at $15.00.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance herewith.

STATE OF OREGON, } ss.
County of Marion, }

I, F. M. SERCOMBE, Clerk of the Court of Appeals of the State of Oregon, do hereby certify that the foregoing copy of judgment has been by me compared with the original journal entry and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record, and in my office and custody.

IN TESTIMONIAL WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Salem, Oregon, June 26, 1970.

F. M. SERCOMBE
Clerk of Court of Appeals, State of Oregon

TO THE CIRCUIT COURT OF THE STATE OF OREGON, for the County of Benton.

You are hereby commanded that of the above judgment order of our Court of Appeals you cause proper entry to be made upon the records of your court, as of a judgment therein, and proceed to final determination and execution thereof, as to the said order of our Court of Appeals, and to law and justice shall appertain.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, June 26, 1970.

F. M. SERCOMBE
Clerk of Court of Appeals, State of Oregon

APPENDIX III

BE IT REMEMBERED that in the COURT OF APPEALS of the State of Oregon, in the city of Salem, on this TUESDAY, the 3rd day of FEBRUARY, 1970, the following proceedings were had:

STATE OF OREGON,
Respondent

v.

DANA EILEEN TUCK,
Appellant

Appeal from BENTON County

The court having duly considered appellant's Petition for Rehearing, and the court being fully advised therein,

IT HEREBY IS ORDERED that said petition be and the same hereby is denied.

STATE OF OREGON,
County of Marion, } *ss.*

I, Joseph A. Guimond, Deputy, Clerk of the Court of Appeals of the State of Oregon, do hereby certify that the foregoing copy of order in re State v. Tuck has been by me compared with the original and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record, and in my office and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Salem, Oregon, July 10, 1970.

JOSEPH A. GUIMOND
Deputy Clerk of Court of Appeals, State of Oregon

APPENDIX IV

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 2nd day of MARCH 1970, WHEREUPON on this TUESDAY, the 21st day of APRIL 1970, the same being the 19th judicial day of said term, when the following proceedings were had:

STATE OF OREGON,
Respondent

v.

DANA EILEEN TUCK,
Appellant

} Appeal from BENTON County On Petition for Review

The court having duly considered appellant's petition for review, and the court being fully advised therein,

IT HEREBY IS ORDERED that said petition be and the same hereby is denied.

STATE OF OREGON,
County of Marion, } *ss.*

I, Mildred Oldenburg, Deputy Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing copy of ORDER, in re: STATE OF OREGON V. DANA EILEEN TUCK has been by me compared with the original and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record, and in my office and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Salem, Oregon, July 10, 1970.

MILDRED OLDENBURG
Deputy Clerk of Supreme Court, State of Oregon

SUPREME COURT, U. S.

No. 411

Supreme Court, U.S.
FILED
AUG 17 1970
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

DANA EILEEN TUCK,

Petitioner,

vs.

STATE OF OREGON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel for Respondent,

JACOB B. TANZER
Solicitor General
322 State Office Building
Salem, Oregon 97310

FRANK D. KNIGHT
District Attorney
JAMES McELWAIN BROWN
Deputy District Attorney
Benton County Courthouse
Corvallis, Oregon97330

SUBJECT INDEX

Page

Opinions of the Courts Below..... 1

Statement of the Grounds on Which the Jurisdiction of this Court is Invoked 1

Questions Presented for Review..... 1

Constitutional Provisions Which the Case Involves..... 2

Respondent's Supplementary Statement of the Case..... 3

Stage of the Proceedings at Which and Manner in Which the Federal Questions Sought to be Reviewed Were Raised..... 7

Reasons for Denying Writ

I. The United States Supreme Court has Denied Certiorari in Retroactivity Cases of Greater Merit.7

II. The Decision of the Oregon Court of Appeals was Clearly Correct.....13

III. A General Search is Not at Issue.....18

IV. Lawfulness of the Arrest is Not Properly Before the Court.....18

Conclusion.....21

TABLE OF CASES CITED

Chimel v. California, 395 U.S. 752, 89 Sup. Ct. 2034, 23 L.Ed.ed 685 (1969) 7,8,9 10,11 13,14,16,21

Desist v. United States, 394 U.S. 244, 89 Sup. Ct. 1030, 22 L.Ed.2d 248 (1969)..... 11

Fresneda v. State, Alaska, 458 P.2d 134 (1969) 9

Linkletter v. Walker, 381 U.S. 618, 85 Sup. Ct. 1731, 14 L.Ed.2d 601 (1965)..... 11

Lyon v. United States, 416 F.2d 91 (5th Cir. 1969), cert. denied, 90 Sup. Ct. 597 (1970)..... 7,9

People v. Edwards, 80 Cal. Rptr. 633, 458 P.2d 713 (1969)..... 9

Terry v. Ohio, 392 U.S. 1, 88 Sup. Ct. 1868, 20 L.Ed.2d 889 (1968) .. 10

United States v. Bennett, 415 F.2d 1113 (2d Cir. 1969), cert. denied, 90 Sup. Ct. 113, 117 (1969)..... 8,9

United States v. Rabinowitz, 339 U.S. 56, 70 Sup. Ct. 430, 94 L.Ed. 653 (1950)..... 10

Williams v. United States, 418 F.2d 159 (9th Cir. 1969)..... 9,11

STATUTES

	Page
Ore. Rev. Stat. 474.990 (1969).....	17
Ore. Rev. Stat. 137.510 (1955).....	17
Ore. Rev. Stat. 137.540 (1969).....	17

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The State of Oregon accepts Petitioner's recital of opinions of the courts below.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The State of Oregon accepts Petitioner's statement of the grounds on which the jurisdiction of the court is invoked.

QUESTIONS PRESENTED FOR REVIEW

The State of Oregon does not fully accept Petitioner's statement of questions presented for review. The record does not show that a general search was undertaken by police officers. For that reason, the question whether a general search should invalidate a seizure of evidence within the reach of Petitioner

is not before the court. The record does not contain the original complaint, arrest warrant or any testimony regarding the issuance of the arrest warrant. Additionally, the Petitioner did not challenge the validity of the arrest warrant until after the Oregon Court of Appeals rendered its opinion. For those reasons, the question whether Petitioner's rights were violated by the manner in which warrant issued for her arrest was not properly raised or preserved and is not properly before the Court.

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

The State of Oregon accepts Petitioner's statement of constitutional provisions which the case involves.

RESPONDENT'S SUPPLEMENTARY STATEMENT OF THE CASE

The Petitioner's statement of the case contains substantial inaccuracies and omissions and the State of Oregon therefore submits this supplementary statement of facts. The complete transcript of trial is very short and the testimony of the State's witnesses was not contradicted or disputed.

The Petitioner was arrested in a small residence in the City of Corvallis, Oregon, at 9:55 a.m., April 19, 1968. The arresting officer had in his possession a District Court felony warrant in the name of Petitioner. The arrest warrant had been issued upon a police officer's information and belief that Petitioner was in unlawful possession of narcotics, but the record is barren concerning the issuance of

that warrant. Because Petitioner was tried separately for the offense for which the arrest warrant issued, neither the record nor the case file herein show the affidavit of the officer, the arrest warrant, or the Petitioner's subsequent conviction on that charge.

The residence was "quite small" and appeared to have been "a single car garage back in behind the main house." According to the arresting officer's testimony, "There is a bathroom in it, a closet and part is petitioned out as a bedroom, not a full wall, but a false wall across it and the entire building couldn't be much more than about 12 by 14 feet or so." (Tr 4)

The Petitioner opened the door when the police knocked and the offi-

cers entered. Three other young women were present in the cabin. Officer McDonald informed Petitioner of the charge and her constitutional rights, and then stated his intention to search the immediate area. Officer McDonald turned to the right-hand side of the room just inside the door. He first picked up a small jewelry box on the top of a television set at which time Petitioner said, "Give that to me". The transcript contains the officer's uncontroverted description of the subsequent events:

> "Q. Where was she (Petitioner) standing at this time?
>
> "A. She was standing in front and slightly to my left not more than three and a half to four feet away at the very best.
>
> "Q. What did she do as she said this?
>
> "A. She grabbed for the container,

the jewelry box.

"Q. What did you do or say then?

"A. I jerked it back away and I said, 'No, I want to take a look at it,' and she said, 'Give it to me, it's mine,' and I refused to do so." (Tr 6-7)

The jewelry box was opened after this exchange and contents subsequently identified as marihuana and a dangerous drug (methamphetamine) were discovered under a false bottom in that box.

At trial the jewelry box and its contents were introduced into evidence. Petitioner did not file a motion to suppress the items seized nor did she object to their admission at trial. Petitioner was convicted of unlawful possession of narcotics and of illegal possession of a dangerous drug on October 8, 1968.

STAGE OF THE PROCEEDINGS AT WHICH AND MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

The State of Oregon accepts Petitioner's statement of the stage of proceedings at which and manner in which the federal questions for which review is sought were raised.

REASONS FOR DENYING WRIT

I. The United States Supreme Court has Denied Certiorari in Retroactivity Cases of Greater Merit

a. Retroactivity of Chimel has been determined against Petitioner.

Petitioner's one argument of possible federal substance, retroactivity of Chimel v. California, 395 U.S. 752, 89 Sup. Ct. 2034, 23 L.Ed.2d 685 (1969) has been rejected by the United States Supreme Court in cases clearly presenting that issue. In Lyon v. United States, 416 F.2d 91 (5th Cir. 1969) the Court

of Appeals expressly held that Chimel did not apply retroactively to a search conducted before that case was decided. The issue was raised on appeal and the search had revealed incriminating evidence in a kitchen alcove, even though the defendant had been arrested in his front hallway. Certiorari was denied by this Court on January 12, 1970 (90 Sup. Ct. 597). United States v. Bennett, 415 F.2d 1113 (2d Cir. 1969) was a similar case in which the Court of Appeals declined to apply Chimel retroactively. Certiorari was denied on October 13, 1969 (90 Sup. Ct. 113, 117)

b. General authority is against retroactivity. Although Petitioner has suggested that the jurisdictions are in disarray regarding retroactive application of Chimel, general authority

has held against retroactivity: Lyon v. United States, supra; United States v. Bennett, supra; Williams v. United States, 418 F.2d 159 (9th Cir. 1969); People v. Edwards, 80 Cal. Rptr. 633, 458 P.2d 713 (1969). Fresneda v. State, Alaska, 458 P.2d 134 (1969), is contra but that state court may have been influenced by particularly harsh facts (the appellant had received an eight-year sentence whereas a co-defendant had pleaded guilty and served but six months).

c. The facts presented in this case are not appropriate for retroactive application of Chimel. The Corvallis police seized the jewelry box in the belief that they were entitled to search the immediate area after the arrest. As the Court recognized, in Chimel, (395 U.S. at 760),

United States v. Rabinowitz, 339 U.S. 56, 70 Sup. Ct. 430, 94 L.Ed. 653 (1950), authorized warrantless searches extended to the area in the "possession" or under the "control" of the person arrested. The police who arrested Petitioner searched deliberately in a manner consistent with then-existing law.

If there was any unlawful invasion of Petitioner's constitutional rights, that invasion was of insufficient consequence to threaten "the imperative of judicial integrity". Terry v. Ohio, 392 U.S. 1, 12-13, 88 Sup. Ct. 1868, 20 L.Ed. 2d 889 (1968) The Chimel opinion observed that the Fourth Amendment "is designed to prevent, not simply to redress, unlawful police action." 395 U.S. at 766 n. 12. The police action

involved herein was so limited that redress now would be disproportionate to putative unlawfulness and prophylaxis is unnecessary - the police have been fully advised of new principles of conduct.

The Ninth Circuit Court of Appeals, in Williams v. United States, supra, at 162, noted the previously established criteria concerning retroactivity of a new constitutional rule (citing Linkletter v. Walker, 381 U.S. 618, 85 Sup. Ct. 1731, 14 L.Ed. 2d 601 (1965) and Desist v. United States, 394 U.S. 244, 89 Sup. Ct. 1030, 22 L.Ed.2d 248 (1969)). Those criteria, applied to the present case, do not require retroactive application of Chimel. Deterrence of unlawful police conduct would not be furthered and retroactive application to this

case would have a deleterious effect upon the administration of justice. Further, the police, the prosecutor and the trial court relief upon the old standards.

Application of the exclusionary rule in a case of the nature presented would be particularly unfortunate because delays in the appeal permitted the retroactivity question to arise. This Petitioner was tried and convicted on October 8, 1968. Upon Motions and Stipulations, the time for submission of the final brief in the Oregon Court of Appeals (Defendant-Appellant's Reply Brief) was ultimately extended to July 19, 1969. If the matter is finally resolved against her, Petitioner would not enter confinement until almost two years after conviction and two and

one-half years after the offense.

II. The Decision of the Oregon Court of Appeals was Clearly Correct

a. The Oregon Court of Appeals did not reach the retroactivity issue.

Although Petitioner urges that her case presents a question of the retroactivity of the Chimel principles, the question was not reached by the Court below:

> "It is not necessary for us to decide in this case whether Chimel should be applied to cases arising prior to June 23, 1969. The house in which the defendant was arrested was small, having formerly been a one-car garage. The jewel box containing marihuana and methamphetamine was not concealed, but was plainly visible on top of a television set within reach of the defendant and the arresting officer." State v. Tuck, Or App, 89 Or Adv Sh 815,818, ___ Or ___, 462 P.2d 175 (1969)

It is a fortiori that the Oregon Court of Appeals did not consider the retroactivity question in a manner inconsistent with applicable decisions of

the United States Supreme Court.

b. The record shows that the search was reasonable. As previously noted, the Oregon Court of Appeals assumed arguendo that Chimel applied and then concluded that the seizure had occurred in an area within Petitioner's immediate control. Although it could be contended that anything in a room 12 feet by 14 feet would be within an immediate area, the jewel box seized in the present case was three and a half to four feet from the accused - it was close enough that the Petitioner could, and did, grab for the item in the officer's hand. Such a seizure seems well within the bounds of an area "from within which * * * (an arrested person) * * * might gain possession of a weapon or destructible evidence". Chimel v. California, 395 U.S. at 763. The item was small

and particularly vulnerable to concealment or destruction.

The seized jewel box was in the open, on top of a television set near the door. After the police had arrested Petitioner in the cabin, no further invasion of privacy occurred when the jewel box was taken. On these facts, a greater invasion would have been accomplished if the police had waited for a warrant and remained to ensure that evidence was not destroyed. A small item that is exposed and proximate to an arrested person should be subject to immediate seizure to prevent destruction and to terminate police intervention in the home.

Petitioner has argued that the State failed to meet its burden to show that the jewelry box was within her reach at the time of her arrest.

The characterization of a "burden" assumes retroactive application of the Chimel principles and is particularly difficult to countenance when the Petitioner neither moved to suppress seized evidence before trial nor objected to its admission into evidence. Those procedural lapses by Petitioner operated to limit the State's proof to matters relevant and admissible.

c. The trial court imposed a sentence well within limits set by statute. Imposition of Petitioner's sentence for unlawful possession of marihuana was suspended and Petitioner was placed on probation for a period of five (5) years, a condition of that probation being that she serve one (1) year in the county jail. She was sentenced to serve six months in the county jail upon her conviction for

illegal possession of a dangerous drug (methamphetamine). These sentences would run concurrently.

Under Oregon statute (Ore. Rev. Stat. 474.990) Petitioner could have been punished by a fine not exceeding $5,000, or by imprisonment in the State Penitentiary for a period not exceeding ten years, or both. Under Ore. Rev. Stat. 137.510 the Court is authorized to suspend imposition of sentence for any period not to exceed five years. A further provision, Ore. Rev. Stat. 137.540, provides that the Court may set conditions of probation when imposition of sentence is suspended. Among other conditions, the Court may order that a person convicted be confined to the county jail for a period not to exceed one year or one-half of the maximum period of confinement that could be

imposed for the offense.

III. A General Search is Not at Issue

The record does not support the Petitioner's assertion that police officers conducted a general search of the cabin. The argument is based upon an officer's testimony that he knew there were dirty clothes throughout this small house and the lavatory was plugged. If the inference of a broad search is drawn, nevertheless no evidentiary matter resulted. Petitioner's argument is analogous to an assertion that proceeds of a lawfully executed search warrant on a house should be excluded because police officers improperly searched an automobile parked nearby.

IV. Lawfulness of the Arrest is Not Properly Before the Court

Petitioner's attack upon the original arrest warrant was not made in a

timely fashion and is not supported by the record. The claim that Petitioner's constitutional rights were violated by the manner in which the original arrest warrant was issued was first raised by the Petition for Rehearing in the Oregon Court of Appeals following the decision of that court. Although the content of that argument could be answered, the State of Oregon declines to pursue the matter outside of the record as the Petitioner has done.

Because Petitioner did not raise that issue at any time before or during trial, and because a separate trial was had on the offense leading to the arrest warrant, the trial record in the present case does not include the officer's affidavit or the warrant itself. Petitioner's

description of the basis for the warrant (included in the Petition for Rehearing to the Oregon Court of Appeals) is no more than Petitioner's unsworn representation of the circumstances.

The assertion of this issue now, following Petitioner's failure to test the arrest at appropriate stages, is unrealistic. The arrest occurred on April 19, 1968, and trial was held on October 8, 1968. The affidavit and warrant were public record and a preliminary hearing was held at Petitioner's request. Because the arrest was not questioned either before or during the trial, introduction by the State of the basis for that arrest on another marihuana charge would have been subject to defense objection as irrelevant and prejudicial. Now, sheer passage of time has diminished the ability of the police and magistrate

to recall the factual circumstances of arrest. To allow Petitioner to raise the issue at this time would be to allow Petitioner to unreasonably invoke the appellate process.

CONCLUSION

The State of Oregon respectfully represents that the opinion of the Oregon Court of Appeals did not rest upon the determination of a substantial federal question. Retroactivity of Chimel v. California was not an essential issue in the case and the record of trial does not support the contention that a seizure occurred in violation of subsequently announced Chimel principles. The opinion of the Oregon Court of Appeals was clearly correct and the Petition for Writ of Certiorari presents

no issue of substance that would justify review by this Court.

Respectfully submitted,

State of Oregon
Respondent

By Jacob B. Tanzer
Solicitor General
322 State Office
Building
Salem, Oregon 97310

Frank D. Knight
District Attorney
James McElwain Brown
Deputy District Attorney
Benton County Courthouse
Corvallis, Oregon 97330

Counsel for Respondent